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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID SIMON,

Plaintiff and Appellant,

v.

PETER D. GORDON,

Defendant and Respondent.

B203607

(Los Angeles County
Super. Ct. No. BC348597

APPEAL from a judgment of the Superior Court of Los Angeles County,
Joanne Donnell, Judge. Affirmed.

David Simon, in pro. per., for Plaintiff and Appellant.

Joseph F. Ford for Defendant and Respondent.

David Simon appeals an order denying relief from a judgment entered following dismissal of a complaint for failure to effect service. We affirm.

FACTS AND PROCEDURAL BACKGROUND

1. Simon's complaint for legal malpractice.

On March 8, 2006, Simon filed a complaint for legal malpractice against Peter Gordon. The complaint alleged that, due to Gordon's failure to file lis pendens with respect to two parcels of real property, the properties were sold to third party purchasers. Gordon then filed an action against the third party purchasers to mitigate damages (the Van Nuys action). However, Gordon did not handle the Van Nuys action properly and it remains pending.

2. OSC's re proof of service result in dismissal of the complaint without prejudice.

On July 10, August 29, and November 2, 2006, the trial court conducted hearings on orders to show cause why Simon failed to serve the complaint.

Simon filed proof of substituted service on Gordon before the November 2, 2006 hearing. However, Gordon retained counsel who appeared specially and filed a motion to quash service. On November 30, 2006, the trial court granted Gordon's motion to quash service as improper substituted service on an individual. The trial court continued the matter to January 5, 2007, for further order to show cause (OSC) re proof of service.

On January 4, 2007, Simon filed a declaration in which he averred Gordon was evading service. Simon appeared at the January 5, 2007 hearing and requested an additional 30 days to effect service. The trial court granted the request and continued the matter to February 5, 2007.

On February 5, 2007, the trial court called the matter for OSC re proof of service. The trial court's minute order for that date notes, "There is no appearance this date on behalf of the plaintiff." The trial court indicated Simon had filed nothing with respect to his further attempts to effect service and ordered the action dismissed without prejudice.

3. Simon's motion for relief from dismissal based on substituted service effected January 8, 2007.

On August 3, 2007, 178 days after the February 5, 2007 order dismissing the action, Simon filed a motion for relief from the dismissal under Code of Civil Procedure section 473, subdivision (b).¹ Simon's motion pointed out that a professional process server effected service of the summons and complaint on Gordon on January 8, 2007 by substituted service. However, Simon inadvertently failed to file the proof of service in advance of the February 5, 2007 hearing. Simon filed the proof of service of the summons and complaint on the same date he filed the motion for relief from dismissal. Simon claimed he was present in the courtroom on February 5, 2007 and advised the trial court of the service but the trial court ordered the matter dismissed because the proof of service was not in the court file.

Gordon's opposition indicated Simon did not attend the February 5, 2007 hearing. This misstatement, Gordon asserted, was sufficient to warrant disregard of Simon's entire declaration as untrustworthy. Gordon further noted Simon's motion was untimely and Simon served the motion himself in violation of section 1013a, which directs that service by mail must be made by an adult who is not a party to the action.

Gordon's declaration asserted Simon is an experienced litigator who has been involved in numerous lawsuits going back more than ten years and he has sued five of the attorneys who have represented him. Gordon argued Simon's delay in seeking relief had resulted in prejudice related to problems of proof in that the Van Nuys action concerned the sale of real property by Simon's stepmother in 2004 and 2005 and proof of the allegations in that case becomes more difficult as

¹ Subsequent unspecified statutory references are to the Code of Civil Procedure.

time passes, given the death of Simon's father and the flight of Simon's stepmother to Mexico.

Simon replied the motion was filed within the six-month limit of section 473, subdivision (b) and Gordon would not be prejudiced by setting aside the dismissal because the damages attributable to Gordon's malpractice could not be determined until the Van Nuys action had been tried.

4. The trial court's ruling on Simon's request for relief from dismissal.

On August 31, 2007, the trial court conducted a hearing on Simon's motion. The trial court tentatively denied the motion finding Simon failed to explain the delay in seeking relief and there had been no showing of mistake or excusable neglect. The trial court also noted it likely lacked jurisdiction to entertain the motion because it was served personally by Simon, rather than by a third party over the age of 18 years.

When Simon indicated Gordon had been served by a professional process server, the trial court directed Simon to address the trial court's tentative ruling and added, "whether Mr. Gordon was ever served is a great mystery" When Simon stated "this was Fed-ex'd to Mr. Gordon [apparently referring to the proof of service], and it was recorded with the court," the trial court asked Simon to address the failure to show any reason for "the extremely long delay in bringing the motion" and the "total absence of any showing that a proof of service was not filed or perhaps not even made because of mistake or excusable neglect."

Simon responded Gordon was served on January 8, 2007 and, although Simon appeared at the February 7, 2007 hearing, Simon did not have copies of the proof of service with him. However, the proof of service showing service on Gordon on January 8, 2007, had been filed with the court. Simon expressed shock that "it appears you still have no records of this."

Counsel for Gordon indicated Simon did not attend the hearing of February 5, 2007, and he had not explained the delay in seeking relief. Counsel further claimed no “proof of service or alleged proof of service [has] been given to defendant at any point in time.”

The trial court agreed its minute order showed Simon did not attend the February 5, 2007 hearing and that Simon had failed to address the grounds stated in the tentative denial of the request for relief from dismissal. Simon responded: “I am involved in other legal matters that have taken up a lot of my time. [¶] Number one is, we’ve been involved in an appeal, which my attorney has been feverishly working on, and . . . I still responded to the court within the necessary time. [¶] The fact is, your honor, Mr. Gordon was served” on January 8, 2008.

The trial court adopted the tentative decision and denied the motion.

5. Simon’s request for reconsideration.

On September 10, 2007, Simon filed a motion for reconsideration of the trial court’s ruling. (§ 1008, subd. (a).) Simon conceded he may have been mistaken in claiming he attended the February 5, 2007 hearing but insisted service on Gordon was completed on January 8, 2007, well before the February 5, 2007 hearing. Thus, the dismissal should have been set aside. Simon claimed proof of service was filed with the motion for relief from default on August 3, 2007. Simon requested judicial notice of various documents including the proof of service filed August 3, 2007.

In opposition, Gordon noted Simon, once again, served notice of the motion for reconsideration by mailing it himself in violation of section 1013a.

On October 10, 2007, the trial court conducted a hearing on the motion for reconsideration after issuing a tentative decision to deny the motion.

Simon stated Gordon had been served and asked what more needed to be done to correct the trial court’s apparent belief that Gordon had not been served. Simon indicated he had filed the proof of service and had explained the error in the trial court’s records. Counsel for Gordon noted Simon had failed to present

any new facts or circumstances addressing the 178-day delay in seeking relief from dismissal. The trial court adopted the tentative decision and denied the motion.

The tentative decision stated: “[Simon] reargues the original motion to set aside the dismissal, which the court denied on August 31, 2007. The court denied the motion because it was filed just two days short of the mandatory 6-month limit for discretionary relief under CCP section 473 and [Simon] failed to provide, as required, any reasonable explanation for the delay in filing and because he failed to make any showing of mistake or excusable neglect. ([Simon’s] assertion that the court stated that the primary reason for the denial of the motion to set aside the dismissal was that [Simon] still had not filed a proof of service showing service on Gordon is incorrect. See the court’s minute order of August 31, 2007.)” The tentative decision also noted that even if Simon filed the proof of service on August 3, 2007, he provided no explanation for his failure to bring a conformed copy to court on August 31, 2007.

CONTENTIONS

Simon contends the order of dismissal should be set aside because he committed a mistake with respect to the proof of service and he timely sought relief.

DISCUSSION

1. Applicable principles.

Section 473, subdivision (b) states that a court “may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” To obtain discretionary relief under section 473, the moving party must show the requisite mistake, inadvertence, or excusable neglect. (*Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1478.) Section 473 also requires that the party diligently

seek relief “within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.” (§ 473, subd. (b).)

“Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations ‘very slight evidence will be required to justify a court in setting aside the default.’ [Citations.]” (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233, fn. omitted.) “ ‘[T]he policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.’ ” [Citations.]” (*Au-Yang v. Barton* (1999) 21 Cal.4th 958, 963.)

A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254, 257; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

2. *Simon fails to demonstrate an abuse of the trial court’s discretion.*

Simon asserts he was operating under a mistake of fact in that he believed he filed the proof of service before the February 5, 2007 hearing. Simon claims he was mistaken in not appearing at the hearing and in not filing the proof of service. Simon argues he “was so mistaken that [he] believed he had appeared at the February 5, 2007 hearing.” Simon asserts he sought to set aside the dismissal based on the assertedly mistaken belief the proof of service was filed before the hearing date. Simon contends this mistake of fact was reasonable given that on January 5, 2007, Simon appeared in court and explained that Gordon had been avoiding service and service was effected on January 8, 2007. Had the proof of service effected on January 8, 2007, been filed as Simon believed it had, the action would not have been dismissed. Thus, Simon made a showing of mistake sufficient to warrant relief under section 473, subdivision (b).

Simon further contends the motion was timely in that it was filed within six months of February 5, 2007. Because no prejudice to Gordon appears, Simon argues he need produce only very slight evidence explaining the delay in filing the motion. Simon notes that a delay until the 179th day has been overlooked where the moving party demonstrated a need to obtain counsel, investigate and prepare a motion to be filed. (*In re Marriage of Jacobs* (1982) 128 Cal.App.3d 273, 280.) Simon contends he explained the delay by pointing out this malpractice case would have been stayed pending the outcome of the Van Nuys action, which still has not gone to trial. As such, Gordon could not have been prejudiced by the delay.

Simon concludes that because he showed mistake and explained why he did not seek relief sooner and because Gordon was not prejudiced by the delay, the trial court abused its discretion in denying the motion to set aside the dismissal.

Putting aside Simon's failure properly to serve notice of the motion for relief from dismissal (but see *West v. West* (1979) 92 Cal.App.3d 120, 125 [defective service deprives the trial court of jurisdiction]), Simon's claim of error in the denial of relief is not persuasive.

In order to qualify for relief under section 473, the moving party must act diligently. (*Elston v. City of Turlock, supra*, 38 Cal.3d at p. 234 [relief sought eight days after receipt of the adverse notice].) The movant must submit affidavits or testimony demonstrating a reasonable cause for the default. (*Ibid.*) Here, Simon filed the motion for relief two days before the absolute six-month limit for discretionary relief. The only explanation Simon offered for the delay was the press of business caused by his involvement in other cases. This does not constitute a showing of excusable neglect, which generally is defined as an error “ ‘ “a reasonably prudent *person* under the same or similar circumstances might have made” ’ [Citation.]” (*Zamora v. Clayborn Contracting Group, Inc., supra*, 28 Cal.4th at p. 258.) Indeed, *Elston* expressly found a statement that counsel was busy with other matters during the relevant period does not constitute

excusable neglect. (*Elston*, at p. 234 [the press of business absent unusual circumstances is insufficient to warrant relief from default].)

In sum, we find no abuse of the trial court's discretion in its finding Simon failed to explain the delay in filing the motion for relief from dismissal.

3. *Reconsideration properly denied.*

In a separate heading, Simon argues the trial court erred in failing to grant reconsideration of the denial of the request for relief from the order of dismissal. Simon contends the documents he submitted with the request for reconsideration showed errors in the trial court's records. Simon claims he reconstructed the court file to show it contained the proof of service and that Simon could not have known the court file was incomplete before the August 31, 2007 hearing. Simon concludes that because he demonstrated service on Gordon prior to the February 5, 2007 hearing, the trial court improperly relied on Simon's inability to produce a conformed copy of the proof of service at the hearing.

Even if we overlook the fact that Simon once again personally served notice of the request for reconsideration, Simon did not show new or different facts, circumstances or law as required by section 1008, subd. (a).

Simon's argument that proof of service was effected prior to the February 5, 2007 hearing misses the point. The trial court denied the request for relief from default because Simon failed to demonstrate excusable neglect and failed to offer a sufficient explanation for the delay in seeking relief. Simon's motion for reconsideration does not present new or different facts related to those issues. Further, the record reflects the trial court took into account the possibility that Simon served Gordon before the hearing of February 5, 2007.

DISPOSITION

The judgment is affirmed. Gordon shall receive costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.